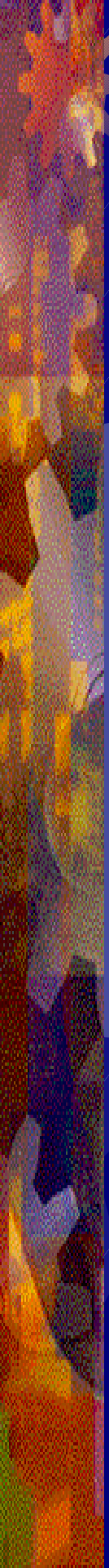

Report of the Workers' Compensation Funds Advisory Committee

December 2001

Executive Summary

The Workers' Compensation Funds Advisory Committee was established to analyze two complex areas in the workers' compensation statute dealing specifically with state fund issues found in MCL 418.521 and MCL 418.372.

The first analysis looks at the method in which differential benefits are calculated in the permanent and total disability provision of the Second Injury Fund and determine if there could be a more simplistic approach taken.

The second issue focuses on the dual employment provision of the Second Injury Fund where we are to identify the numerous sections of the statute that are difficult to administer, lack consistency, and produce a seemingly inappropriate amount of litigation.

By way of background, the Funds Review Committee was established in the fall of 1999 at the request of then Bureau Director, Jack Wheatley. The committee was asked to look at all workers' compensation specialty funds in Michigan, whether funded by the general fund or through assessments. The committee issued its report to the director in March 2000. Part of that executive summary discussed its responsibility as follows:

> "This report analyzes the current need for the various special workers' compensation funds in Michigan. At the time these funds were created, the business, economic, and legal environment in Michigan was substantially different than that which now exists. As a result, the question this report addresses is whether today's circumstances support continuation or modification of the funds."

That committee reviewed and made recommendations on the 12 then existing state fund provisions. This report looks in depth at two of these provisions where change was recommended.

Regarding the permanent and total disability provision of the Second Injury Fund, the former committee's conclusions were, "There does not appear to be any basis for shifting the cost of paying permanent and total disability benefits from the responsible carrier or self-insured employer to the Second Injury Fund." Part of their recommendation was, "The statute be amended to allow a specific percentage increase in benefits per year under this provision until the individual receives 90% of the average weekly wage of the date of injury, but not less than 25% of the current average weekly wage."

Executive Summary

The former committee also reviewed the Second Injury Fund, dual employment provision and concluded, “This provision provides a fair balance between the competing concerns of providing injured employees, employed in dual employment, with adequate workers’ compensation benefits, and that the employer where the employee is injured should only pay for the wage loss attributable to that employment.” They also concluded, “This fund has experienced frequent litigation over certain legal issues and the statute should be amended to minimize the likelihood of such litigation.” The committee made a number of specific recommendations in an attempt to lessen litigation and in some instances, change the amount being paid to the claimant by the carrier and by the fund. Those recommendations will be evaluated and detailed in the body of this report.

This report recommends continuation of the existing statutory formula for establishing the amount of differential benefits due in the permanent and total disability provision.

This report recommends numerous changes in the dual employment provision, including a change in the concept of establishing Second Injury Fund liability and the methodology for determining the carrier’s portion and the fund’s portion of the claimant’s rate.

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Workers' Compensation

Funds Advisory Committee

Advisory Committee & Responsibility

Advisory Committee:

Craig Petersen, Director of the Bureau of Workers' Disability Compensation requested the formation of a committee in the spring of 2001 to review controversial issues dealing the Second Injury Fund. This committee became known as the "Workers' Compensation Funds Advisory Committee" (hereinafter, the Advisory Committee). The members came from many locations around the state and represent diversified interests within the workers' compensation community. Its appointed members are Dennis Morrill (Chair), Sharon Baisden, Ray Cardew, John Charters, Janet Kransz, Duncan McMillan, Morrie Ozinga, Steve Pollok, James Reiter, Janice Remer and Connie See. Allison Kelly, Executive Secretary for the Funds Administration, provided invaluable assistance to the committee.

Responsibility:

The Advisory Committee was requested to review and evaluate issues within two provisions of the Second Injury Fund.

We were to evaluate the current statutory concept for computing differential benefits in the permanent and total disability provision of the Second Injury Fund and compare that against the recommendation made by the former Funds Review Committee, as well as determine if there is any other approach that would simplify the calculation of a P&T benefit. If a different approach is recommended, we were to address the impact it could have on the workers' compensation system.

Secondly, we were asked to review and evaluate the dual employment provision of the Second Injury Fund. In this area, we were to evaluate the entire provision with the suggestions made by the Funds Review Committee, as well as any other issues brought by individual Advisory Committee members, and determine if new concepts would make this provision easier to administer and provide more equitable results for injured workers, carriers and the fund.

The Advisory Committee met nine times between April 9, 2001 and December 21, 2001.

Statutory Authority

Statute:

The statute outlining the differential benefit responsibility for permanent and total disability is found in MCL 418.521(2):

418.521 Second Injury Fund; Payments Reimbursable.

Section 521. (2) Any permanently and totally disabled person as defined in this act, if such total and permanent disability arose out of and in the course of his employment, who, on and after June 25, 1955, is entitled to receive payments of workmen's compensation in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability, and for a lesser number of weeks than the duration of such permanent and total disability, after the effective date of any amendatory act by which his disability is defined as permanent and total disability, or by which the weekly benefits for permanent and total disability are increased, shall receive weekly from the carrier on behalf of the second injury fund differential benefits equal to the difference between what he is now or shall hereafter be entitled to receive from his employer under the provisions of this act as the same was in effect at the time of his injury, and the amounts now provided for his permanent and total disability by this or any other amendatory act, with appropriate application of the provisions of sections 351 to 359. Such payments shall continue after the period for which the person is otherwise entitled to compensation under this act for the duration of the permanent and total disability. Any payments so made by a carrier pursuant to this section shall be reimbursed to the carrier by the second injury fund as provided in this chapter.

The statute dealing with dual employment issues is found in MCL 418.372:

418.372 Employee engaged in more than 1 employment at time of personal injury or personal injury resulting in death; liability; apportionment of weekly benefits; exception.

Sec. 372. (1) If an employee was engaged in more than 1 employment at the time of a personal injury or a personal injury resulting in death, the employer in whose employment the injury or injury resulting in death occurred is liable for all the injured employee's medical, rehabilitation, and burial benefits. Weekly benefits shall be apportioned as follows:

> (a) If the employment which caused the person injury or death provided more than 80% of the injured employee's average weekly wages at the time of the personal injury or death, the insurer or self-insurer is liable for all of the weekly benefits.

Statutory Authority

> (b) If the employment which caused the personal injury or death provided 80% or less of the employee's average weekly wage at the time of the personal injury or death, the insurers or self-insurer is liable for that portion of the employee's weekly benefits as bears the same ratio to his or her total weekly benefits was the average weekly wage from the employment which caused the personal injury or death bears to his or her total weekly wages. The second injury fund is separately but dependently liable for the remainder of the weekly benefits. The insurer or self-insurer has the obligation to pay the employee or the employee's dependents at the full rate of compensation. The second injury fund shall reimburse the insurer or self-insurer quarterly for the second injury fund's portion of the benefits due the employee or the employee's dependents.

(2) For purposes of apportionment under this section, only wages which were reported to the internal revenue service shall be considered, and the reports of wages to the internal revenue service are conclusive for the purpose of apportionment under this section.

(3) This section does not apply to volunteer public employees entitled to benefits under section 161(1)(a).

Second Injury Fund, Permanent & Total Disability Provision

Issue:

Determine if there is a simpler method to calculate differential rates.

Background:

Many involved in the workers' compensation system believe the computation of permanent and total disability benefit rates is complex, confusing and esoteric. This belief is based, in part, on the various benefit standards used to determine the rates payable to those who are permanently and totally disabled. In addition, responsibility for the actual computation of the rates payable to the relatively few injured workers who become permanently and totally disabled has remained with the Second Injury Fund. (As of December 1, 2001, 1,290 injured workers received permanent and total disability benefits.)

Currently, permanently and totally disabled employees are entitled to receive the difference between the carrier's base weekly rate for the date of injury and 80% of the after tax average weekly wage for the year of payment, but not more than the maximum weekly rate (90% of the state's average weekly wage) or less than the minimum weekly rate (25% of the state average weekly wage) for the year of payment. The weekly amount payable is called the "differential benefit" rate. Statutory language describing the weekly liabilities of both the carrier and the fund is found in Chapters 3 and 5 of the Workers' Disability Compensation Act.

Since permanently and totally disabled workers are paid as if injured today, the weekly rates change whenever the Bureau of Workers' Disability Compensation announces new rates. Generally, rates change at the beginning of each year when the bureau publishes its weekly benefit tables, i.e., 80% after tax rates, and the state average weekly wage for the year.

The factors and benefit standards used in determining the weekly amounts payable in permanent and total disability cases are the same factors and benefit standards[1] used to determine the weekly rates payable in total disability cases. In fact, it could be argued the calculation of the rates payable to a permanently and totally disabled individual is no more difficult than the calculation of the rates payable to one who is totally disabled.

[1] The minimum weekly benefit rate in permanent and total disability cases is 25% of the state average weekly wage. See § 356 (3). This benefit standard does not apply in general disability cases.

Second Injury Fund, Permanent & Total Disability Provision

Some have suggested a simpler calculation method should be developed to calculate permanent and total disability benefit rates. In its report, the Funds Review Committee (FRC) recommended that the statute be amended to allow a specific percentage increase in benefits per year until the individual receives 90% of the average weekly wage on the date of injury, but not less than 25% of the current average weekly wage.

This committee considered the FRC's recommendation and reviewed other methods that would simplify the calculation of differential benefit rates. In one method, a multiplier would be applied to the carrier's base rate. Claimants would receive a fixed percentage of the base rate in addition to the carrier's weekly rate. In another method, a fixed lump sum amount would be established for permanent and total disability. The lump sum amount would be paid either as a lump sum or as a weekly rate over 800 weeks.

Calculating differential benefit rates based on either a percentage of the benefits each year, a multiplier, or paying a lump sum amount (whether as a weekly rate or as a lump sum) could simplify the calculations. All of the methods reviewed would change the amounts payable to the permanently and totally disabled. Some disabled employees would receive less than the amount provided by the current method; some would receive more.

The committee agreed the method of calculating permanent and total disability benefit rates can be simplified, however, the current method is preferred. The actual calculation of differential benefit rates is no more complicated than calculating total disability rates. The committee concluded any change in the method of calculation or payment that provides increased benefits or a lump sum for permanent and total disability will increase the number of claims filed for permanent and total disability, will increase litigation costs, and will increase settlement values.

The committee felt the Second Injury Fund should place the instructions for calculating differential benefit rates on the Bureau of Workers' Disability Compensation's web site.

Recommendation:

The committee recommends that the current method of calculating permanent and total disability benefit rates remain unchanged. The committee further recommends that the Second Injury Fund place the instructions for calculating differential benefit rate on the Bureau of Workers' Disability Compensation's web site.

Second Injury Fund, Dual Employment Provision

Issues:

Should carriers pay, at a minimum, 25% of the state average weekly wage for a specific loss and 50% of the state average weekly wage for a death.

Should carriers provide the maximum rate allowable without fund reimbursement if wages at the place of injury so provide.

Should the method of calculating liability be modified.

Funds Review Committee Recommendation:

The Funds Review Committee recommended, "The employer where the injury occurred pay, at a minimum, twenty five percent of the state average weekly wage for a specific loss and fifty percent of the state average weekly wage for a death, without application of the apportionment provision of the Second Injury Fund." The Funds Review Committee also recommended, "That if the wages of the employment where the employee was injured provide maximum workers' compensation benefits then the Second Injury Fund is not liable for any of the benefits paid."

Background:

Section 371(2) provides that the average weekly wage is based on the worker's earnings in all employments covered under the act. Section 372 provides that if 80% or less of the worker's average weekly wage was earned at the job in which the injury occurred the carrier is entitled to proportionate reimbursement from the Second Injury Fund. The dual employment provision gives an injured worker a benefit rate based on all earnings at the time of injury without placing an unfair burden on the employer. Section 372 (1) (b) states:

> "If the employment which caused the personal injury or death provided 80% or less of the employee's average weekly wage at the time of personal injury or death the insurer or self-insurer is liable or that portion of the employee's weekly benefits as bears the same ratio to his or her total weekly benefits as the average weekly wage from the employment which caused the personal injury or death bears to his or her total weekly wages. The insurer or self-insurer has the obligation to pay the employee or the employee's dependents at the full rate of compensation. The second injury fund shall reimburse the insurer or self-insurer quarterly or the second injury fund's portion of the benefits due the employee or the employee's dependents."

Second Injury Fund, Dual Employment Provision

Under the current law, the carrier's liability is usually reduced when the dual employment provision has reimbursement liability. The carrier's liability can be less than the minimums for a specific loss or death case. Furthermore, even if the wages from the job in which the injury occurred support a maximum benefit rate, the fund may have liability. These inequities occur because the Second Injury Fund reimburses a percentage of the weekly benefit based on the ratio of the employee's average weekly wage from the non-injury employer to the employee's total average weekly wage.

The committee suggests a carrier should pay no more or no less in weekly benefits because the injured worker had more than one job at the time of injury. Although not specifically recommended by the Funds Review Committee, we recommend that an alternative method of calculating the fund's liability be considered. The committee recommends the fund reimburse the difference between the total compensation rate due to the injured worker under the act and the rate the carrier would pay based on wages earned at the place of injury. This method would be fair to carriers and the fund without affecting the injured worker's rate. The fund would have no liability if the employment where the injury occurred provided the maximum weekly benefit rate. With this change carriers may experience a savings in assessments but an increase in the share of indemnity. We also recommend elimination of the 80%/20% split. The fund would reimburse any case where the wages from the non-injury employer were included to provide a higher benefit rate. Eliminating the 80% requirement would increase fund reimbursements but there would be a trade off between reimbursing less on each case and reimbursing more cases.

The committee also discussed who should receive credit for post injury wages earned at the place of injury, non-injury employer, and other employers.

<u>Recommendation</u>:

The committee recommends a new method to calculate the Second Injury Fund's liability. The fund would reimburse the difference between the total compensation rate due and the rate the employer would pay based on wages earned at the place of injury. The carrier is liable only for the benefits that would be due if the employee had not been dually employed. The weekly benefit will be reduced by applying all deductions and credits available under the act. If the average weekly wage from the place of injury provides the maximum rate, the Second Injury Fund would have no liability.

The committee recommends that the employer where the injury occurred pay no less than twenty five percent of the state average weekly wage for a specific loss and fifty percent of the state average weekly wage in the event of death.

Second Injury Fund, Dual Employment Provision

The earnings at the place of injury or another employer(s), other than the non-injury employer(s) at the time of injury, would first be credited to the carrier. If the carrier's rate is reduced to zero, the fund would take credit for any additional earnings that did not offset the carrier's liability. Earnings from the non-injury employer(s) at the time of injury would first be credited to the fund.

The committee also recommends eliminating the 80%/20% reimbursement apportionment test.

Second Injury Fund, Dual Employment Provision

Issue:

Should the fund be allowed to reduce their rate against coordinatable benefits received from the non-injury employer.

Funds Review Committee Recommendation:

The Fund's Review Committee recommends, "Wage continuation benefits provided by the employer, where an injury did not occur, should be coordinated with the workers' compensation benefits paid to the injured employee; but not to exceed the amount of the benefits based on the wages paid by that employer."

Background:

The purpose behind the 1981 workers' compensation reform on coordination of benefits was to provide a major savings to employers who contribute to other programs that provide replacement wages to employees and, thus, were providing duplicate payments. The 1981 amendments also changed the computation of the compensation rate to 80% after tax value and raised the maximum benefit rate, increasing workers' compensation weekly rates.

Section 354 allows for coordination of other benefits financed, either wholly or partially, by the employer responsible for the payment of weekly benefits under the act. However, § 354 does not permit the coordination of benefits received from the employer where the injury did not occur, and § 372 does not address coordination.

Section 354 (coordination section) provides, in pertinent part:

> "This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 418.351, 361 or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act . . . payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employers; or pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also received or being received by the employee. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under 418.361(2) and (3) shall be reduced by these amounts:

Second Injury Fund, Dual Employment Provision

> Fifty percent of the amount of the old-age insurance benefits received or being received under the social security act. The after-tax amount of the payments received or being received under a self-insurance plan, a wage continuation plan, or under a disability insurance policy provided by the same employer from whom benefits . . . are received if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. . . .
>
> The proportional amount, based on the ratio of the employer's contributions to the total insurance premiums for the policy period involved, of the after-tax amount of the payments received or being received by the employee pursuant to a disability insurance policy provided by the same employer from whom benefits . . . are received.
>
> The after-tax amount of the pension or retirement payments received or being received pursuant to a plan or program established or maintained by the same employer from whom benefits . . . are received, if the employee did not contribute directly to the pension or retirement plan or program. . . .
>
> The proportional amount, based on the ratio of the employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee pursuant to a plan or program established or maintained by the same employer from whom benefits . . . are received, if the employee did contribute directly to the pension or retirement plan or program. . . .
>
> For those employees who do not provide a pension plan, the proportional amount, based on the ratio of the employer's contributions to the total contributions made to a qualified profit sharing plan under section 401(a) of the internal revenue code. . . ."

The Second Injury Fund has also taken the position that the fund's liability is based on the coordinated rate. However, the court recently disagreed in *Rahman*, 245 Mich 103 (2001). Mr. Rahman received a disability pension from the place of injury. The Court of Appeals held reimbursement from the Second Injury Fund must be calculated without regard to coordination of benefits. The court's holding that the fund's apportionment percentage is to be applied to the unreduced amount, rather than to benefits actually paid, raises more issues that will have to be resolved through litigation or legislative amendments.

Second Injury Fund, Dual Employment Provision

The majority of the committee members agree that the benefits described in § 354 should be applied to benefits financed by the non-injury employer for the purpose of Second Injury Fund coordination. Of particular concern was the financial impact of this proposal on injured workers. Some members felt the coordination provision was unfair because the weekly benefit rate, not the average weekly wage, is coordinated so the high wage earner experiences a larger wage loss when benefits are coordinated. Also, wage replacement benefits are usually negotiated through unions and by contract, typically resulting in an employee giving up other benefits and higher wages in exchange for the security of having income replacement if they become disabled. The committee recognizes this is a significant and complicated change that may only affect a limited number of cases. However, other members felt an employee should not be financially better off when disabled. As it presently stands, the fund is compensating an injured employee for wage loss benefits arising from the non-injury employment. If that non-injury employment already provides wage replacement, some committee members believe the fund should receive credit for that wage replacement so as to not duplicate the same wage loss.

The committee discussed alternative methods of coordination. It was agreed that other benefits financed by the non-injury employer, as described under § 354, should be coordinated. However, the committee suggests such benefits should be treated as continuing wages under § 361 (1). For the purpose of coordinating the non-injury employer's benefits, the full value of discontinued fringe benefits from the non-injury employer shall be included in calculating the injured employee's average weekly wage. This is a new concept brought forward as a compromise between coordinating under § 354, and not coordinating at all. Members also noted a need for a mechanism to encourage employees to provide coordination information and for carriers to request such information.

This revision will make information gathering and calculation of benefits significantly complex. The committee encourages the Bureau and legislature to weigh the fairness the committee has attempted to achieve in this proposal, against the added costs of administering it and the litigation it may create.

Recommendation:

The committee recommends that coordinatable benefits financed by the place of injury should be credited to the carrier. The carrier would also receive credit for social security coordination and unemployment compensation offset under § 358. If the carrier's share is reduced to zero, the Second Injury Fund may utilize the credits not used by the carrier to reduce its liability.

Second Injury Fund, Dual Employment Provision

Benefits financed by the non-injury employer, would be credited only to the Second Injury Fund. However, such benefits would not be coordinated under § 354, but treated as continuing wages with the application of § 361. For the purpose of coordinating the non-injury employer's benefits, the full value of discontinued fringe benefits from the non-injury employer shall be included in calculating the injured employee's average weekly wage. If the Second Injury Fund's share is reduced to zero the carrier cannot take credit for the remaining balance.

We also suggest the carrier should be compelled to request coordination information and the Second Injury Fund's share of benefits withheld until the injured worker provides a complete and accurate description of the benefits currently being received, and an authorization to obtain any additional information concerning benefits from the non-injury employer.

Second Injury Fund, Dual Employment Provision

Issue:

Should the fund, for apportionment purposes, only use wages reported to the Internal Revenue Service.

The Funds Review Committee recommends that, for purposes of apportionment under this fund, only wages which were reported to the United States Internal Revenue Service (IRS) by the employer or the employee on or before April 16th of the year following the date of injury shall be included.

Background:

An employee's weekly compensation rate is calculated based on the wages lost as a result of the work related disability or death. The actual wage loss benefit is a percentage of the employee's total average weekly wage on the date of personal injury, considering all employments covered by § 371.

Under § 372, when an employee was engaged in more than one employment on the date of injury, the place of injury employer must pay the wage loss benefit to the disabled employee, or the dependents of a deceased employee, based on all covered employments. The place of injury employer is liable for the full weekly benefit rate if the place of injury provided more than 80% of the total average weekly wage. Liability for the weekly benefit is apportioned between the place of injury employer and the Second Injury Fund when the place of injury employer's apportioned share of the average weekly wage is 80% or less of the total average weekly wage. The fund must reimburse the carrier for the portion of the weekly benefit that represents the fund's apportioned share. However, for purposes of reimbursement in dual employment cases, only the wages that were reported to the IRS are used to establish the apportioned shares of liability.

Some employees and employers fail to report earned wages to the IRS. Reasons for not reporting wages range from inadvertent error to an attempt to avoid paying income and employer taxes on the earnings. Whether wages were reported to the IRS has no bearing on the injured employee's average weekly wage and weekly benefit rate. The employee receives weekly benefits based on all proven wages lost due to the disability. The IRS reporting requirement is limited solely to reimbursement in dual employment cases.

Second Injury Fund, Dual Employment Provision

The Second Injury Fund has taken the position that liability cannot be apportioned when the wages earned at either the place of injury or the non-injury employer were not reported to the IRS. The fund has also challenged attempts by injured employees and employers to amend reports to the IRS in order to secure reimbursement from the fund after a claim was filed. Claims involving unreported or under reported wages have caused disputes between the parties, resulting in litigation.

Although case law at the Workers' Compensation Appeal Board, Workers' Compensation Appellate Commission and appellate court levels have been inconsistent in the past, a recent appellate court ruling in this area seems to put the issue to rest.

In *Gilbert vs. Second Injury Fund*, 244 Mich App 326; 625 NW2d 116 (2001), the plaintiff was dually employed when injured but only the wages earned at the non-injury job had been reported to Internal Revenue Service. The fund argued that there was nothing to apportion because the place of injury employer did not report the earnings to the IRS. Consequently, the carrier would be responsible for 100% of the weekly benefit. The Court of Appeals held to the contrary, concluding the portion of § 372 that describes apportionment does not distinguish between the report of wages by either employer. Since the place of injury earnings were not reported to the IRS, 100% of the wages reported to the IRS were attributable to the non-injury employer. The fund was held responsible for 100% of the total compensation rate, including benefits based on the unreported wages earned at the place of injury.

The committee reviewed this issue and concluded the statute is inconsistent. While § 371 indicates an employee is compensated based on all wages lost in covered employments, whether the wages were reported to the IRS or not, the IRS reporting requirement exists only in § 372 for purposes of Second Injury Fund reimbursement in dual employment situations. Under the statute, injured employees must prove the existence of all employments and the wages earned from the employments, and the place of injury employer must pay weekly benefits based on all lost wages. The committee felt no good reason exists to support the statutory inconsistencies. It concluded neither the employer nor the fund should be advantaged or penalized when wages were not reported to the IRS. The committee stated the statute should be amended to resolve the inconsistency between § 371 and § 372 (2) by eliminating the IRS reporting requirement found in § 372 (2).

Recommendation:

The committee recommends that the IRS reporting requirement found in § 372 (2) be eliminated, making § 372, the dual employment provision, consistent with § 371. The employee has the burden of proof to show actual wages earned.

Second Injury Fund, Dual Employment Provision

Issue:

Should any employment covered by § 161 of the act that is compensated at less than 25% of the state average weekly wage be considered dual employment for the purpose of fund reimbursement

The Funds Review Committee recommends that any employment covered by § 161 of the act that is compensated at less than twenty five percent of the state's average weekly wage shall not be considered dual employment for purposes of this fund.

Background:

Section 161(1) provided that volunteer firefighters, safety patrol officers, volunteer civil defense workers, volunteer ambulance drivers or attendants are considered employees of the county, city, village or township. Effective January 1, 1982 the statute was amended to provide that they are considered receiving wages equal to the state average weekly wage. The legislature intended to recognize and adequately compensate those persons who perform a critical public service such as firefighting if injured. In 1982 § 161(a) read as follows:

> (A) A person in the service of the state, a county, city, township, village, or school district, under any appointment, or contract of hire, express or implied, oral or written . . . Members of a volunteer fire department, of a city, village or township, shall be considered to be employees of the city, village or township and entitled to all the benefits of this act when personally injured in the performance of duties as members of the volunteer fire department. Members of a volunteer fire department of a city, village or township shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the village, city, or township for the purpose of calculating the weekly rate of compensation provided under this act. . . .

Section 372(3) expressly provides that, "This section does not apply to volunteer public employees entitled to benefits under § 161(1)(a)." This exempted reimbursement for volunteer fire fighters, safety patrol officers, volunteer civil defense works and volunteer ambulance drivers or attendants. Section 372 was effective January 1, 1982, and has not been amended since.

Second Injury Fund, Dual Employment Provision

Some firefighter employers argued that their employees were not "volunteer" firefighters but "on-call" employees and therefore not entitled to benefits under § 161(1). There is also confusion as to whether an individual is a "volunteer" or "part-time" employee of a fire department. In a dual employment situation this shifted much of the liability for benefits to the fund. There was not any clear criteria to distinguish volunteers from employees. Even payment of wages was not indicative.

In an attempt to end the confusion about volunteer firefighters the legislature amended § 161 in 1995. The amendment changed the wording from volunteer to on-call members of a fire department to make sure paid volunteer firefighters received benefits based on the state average weekly wage unless their actual wage was higher. Section 161 no longer refers to firefighters as volunteers at all. The legislature did not amend § 372(3) to reflect the change in wording to § 161(1). When the legislature renumbered § 161, they divided it into several subsections. The former language in § 161(1)(a) regarding the status and compensation of volunteer firefighters is set forth in § 161(1)(d). Section 372(3) no longer correctly corresponds with § 161.

In 1996 the legislature discussed changing § 372(3) to reflect the changes in § 161(1). The bill provided that the dual employment provision would not apply to on-call members of a fire department entitled to benefits as on-call members of a fire department. This bill was never enacted.

This committee agrees that volunteer fire fighters and their families should continue to be financially protected in case of injury. The committee discussed defining "volunteer" and "on-call" but concluded it was difficult and probably would cause more litigation. Very few departments have volunteers that receive no monetary compensation. Most receive a modest payment for their services. Also, volunteers are usually compensated for attending mandatory meetings. It is further complicated because many city and township charters still refer to the firefighters as "volunteers." Apparently, having the cities and townships change their charters to refer to "on-call" is too cumbersome since many have been in existence for years and are considered "volunteer fire departments."

Second Injury Fund, Dual Employment Provision

The committee believes the statute should be amended to provide for members of a fire department earning less than a specific amount would be considered receiving wages equal to the state average weekly wage for the purpose of calculating the weekly benefit rate. Original discussions were at 25% of the state average weekly wage. In that instance a firefighter injured in 2001, earning less than $178.62 per week would be considered receiving the state average weekly wage. However, some members felt 25% was too high because it could include part time firefighters that currently do not receive benefits based on the state average weekly wage. The committee discussed various percentages and agreed upon 20% ($142.89 for 2001). This amendment would also include on-call members of a life support agency, safety patrol officers and volunteer civil defense workers. The committee does not recommend exempting firefighters, paid or unpaid, from reimbursement under the dual employment provision. However, consistent with previous recommendations, the fund would reimburse the difference between the compensation rate and the carrier's liability based on the state average weekly wage. To compute the compensation rate, the average weekly wage from the non injury employer is added to the state average weekly wage. This change provides a firefighter with more than one job a higher benefit rate than present law.

If the firefighter earns more than 20% of the state average weekly wage, actual earnings are used to calculate the compensation rate and employer's liability. The dual employment provision would reimburse the difference between the total weekly benefit rate and the amount the carrier pays based on the wages earned at the place of injury.

Second Injury Fund, Dual Employment Provision

Recommendation:

The committee recommends the following proposed statutory change to § 161(d):

> "Members of a fire department of a county, city, village, or township shall be considered to be employees of the county, city, village or township and entitled to all the benefits of this act when personally injured in the performance of duties as a member of the fire department. Members of a fire department earning less than 20% of the state average weekly wage on the date of injury for work performed with the fire department, shall be considered receiving the state average weekly wage at the time of the injury, as last determined under section 355, from the county, city, village, or township for the purpose of establishing the average weekly wage under section 371. Wages earned at concurrent employment shall be included for the purpose of calculating the weekly compensation rate. The fire department or its carrier shall be eligible for reimbursement under section 372 only to the extent that the weekly compensation rate payable exceeds the weekly compensation rate the fire department would pay based upon the imputed average weekly wage for the fire department."

With this modification subsection 372(3) should be deleted. Included in this amendment along with fire fighters should be members of a life support agency, safety patrol officers, civil defense workers and emergency rescue teams under § 161(1)(d)(e)(f)(g)(h)(i) and (j).

Second Injury Fund, Dual Employment Provision

Issue:

Should each employer, if more than one employment caused the disability, be responsible for benefits with no fund reimbursement.

Background:

Before January 1, 1981, Chapter 4, the "Occupational Diseases and Disablements" chapter of the Worker's Disability Compensation Act, provided for the apportionment of liability between all employers whose employment contributed to an injured worker's disability. Under the law, past or concurrent employer(s) could be held liable for a portion of the benefits due. Many employers were added to cases, whether or not there was any real exposure, resulting in significant costs to both litigate and administer claims. To cure the problems caused by apportionment, § 435 was amended January 1, 1981, in part, to state "The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted."

Under current law, an employee who suffers a work related personal injury and disability that causes a loss of wage earning capacity is entitled to receive weekly wage loss benefits from the employer that causes the disability. Some have suggested that when an employee has more than one job, and the work performed for the concurrent employers contributed to the disability, each employer should pay its share of the wage loss benefits. In those instances, the dual employment provision of the Second Injury Fund would have no reimbursement responsibility for wage loss benefits paid by employers that contributed toward the disability.

In *Kuchin vs. Dr. Mark Makela, DDS, PC and Drs. Miller & Eaton, LLP*, 2000 ACO # 546, a dental hygienist worked for two employers, performing similar duties for both. She suffered carpal tunnel syndrome and was unable to return to either job. The appellate commission ruled that the last employer where plaintiff worked was liable for all workers' compensation benefits. Leave to appeal was denied by the appellate courts.

The appellate commission's ruling in *Kuchin* is consistent with current statutory law. Further, the dual employment provision receives relatively few claims like *Kuchin* in which the concurrent jobs contributed to the disabling condition.

The committee concluded that the statute was amended to cure the problems caused by apportioning liability between employers. To allow apportionment of liability in dual employment cases would be an undesired return to the past and would cause increased litigation. The dual employment provision should reimburse the last employer in which the exposure occurred whenever more than one of the concurrent employments either caused or contributed to the employee's disabling condition.

Second Injury Fund, Dual Employment Provision

Recommendation:

The committee recommends against amending the dual employment provision to allow apportionment of liability between concurrent employers when more than one of the employments contributed to the disability. The dual employment provision of the Second Injury Fund should reimburse the liable employer for any wage loss benefits paid in excess of the employer's liability.

Second Injury Fund, Dual Employment Provision

Issue:

Should carriers be allowed to request predeterminations of liability before paying the injured worker.

Background:

Under § 372, the employer in whose employment the injury or death occurred is responsible for all benefits. The insurance carrier is obligated to pay the full weekly benefit and seek reimbursement from the Second Injury Fund for the portion of the weekly benefit that represents wage loss from non-injury employments. The law does not provide for review and approval of the claim by the Second Injury Fund before the wage loss benefit is paid to the injured employee.

Most carriers, once aware that the disabled employee was dually employed on the date of injury, will calculate and pay benefits based on all lost wages. However, some carriers will withhold the dual employment portion of the wage loss benefit until the Second Injury Fund acknowledges the claim will be reimbursed. The submission of claims for pre-determination causes delayed payments to the disabled employees. Some employees have filed applications for hearing because the wage loss benefits for the non-injury jobs have been withheld.

While the fund's staff welcomes the submission of cases for pre-determination when unique or unusual issues are involved, most requests for pre-determinations involve routine cases. In routine cases, carriers should be able to determine the compensation rate due and pay the full weekly benefit without the Second Injury Fund's prior review and agreement to reimburse.

The committee considered staff concerns about requests for pre-determination in dual reimbursement cases, noting the statute does not require the fund to pre-approve payment. Carriers who refuse to pay dual employment benefits when payments are due fail to comply with the intent of the worker's compensation statute. The committee recommended the fund request Rule 5 hearings for non-compliance if there are continual problems.

Second Injury Fund, Dual Employment Provision

Recommendation:

The committee recommends the Second Injury Fund request Rule 5 hearings for non-compliance with the workers' compensation statute if a carrier continually requests pre-determinations from the fund before paying dual employment wage loss benefits in routine cases.

Second Injury Fund, Dual Employment Provision

Issue:

Should there be a time limit for carriers seeking reimbursement from the fund.

The Funds Review Committee recommends that claims for dual employment must be filed within one year of the date that the employee notifies the carrier or self-insured of dual employment.

Background:

The statutory requirement for notice of claim for reimbursement from the Second Injury Fund; Silicosis, Dust Disease and Logging Industry Compensation Fund; and the Self-Insurers' Security Fund is found in Chapter Five of the Worker's Disability Compensation Act. Section 541 (2) states:

> "In all cases in which the carrier shall be entitled to be reimbursed, notice of claim for reimbursement shall be filed with the trustees within 1 year from the date on which the right to reimbursement first accrues. After the carrier has established a right to reimbursement, payment shall be made promptly on a proper showing periodically every 6 months."

Rule 16 of the Bureau of Workers' Disability Compensation's general rules, as it relates to the dual employment provision of the Second Injury Fund, states:

> "A carrier believing that reimbursement may be due from the second injury fund under section 372 of the act shall immediately notify the fund of the potential claim. The fund may then conduct an investigation of the personal injury and shall have reasonable time to schedule medical examinations. If a petition is filed with the bureau, then the carrier shall add the second injury fund and the fund shall have the same rights as any other party defendant. The magistrate shall enter an order determining the liability of the carrier and the fund."

Second Injury Fund, Dual Employment Provision

All approved self-insured employers and insurance companies are entitled to receive reimbursement from the three funds found in chapter five when the benefits paid fall within certain statutory requirements. While § 541 states carriers "shall" give notice of claim for reimbursement within one year of the right to reimbursement first accrues, interpretations of the section have implied carriers will suffer no penalty for failure to submit timely requests for reimbursement. The interpretations were implicitly reversed in *Robinson vs. General Motors Corp. and SIF, Vocationally Handicapped Provision,* 242 Mich App 331 (2000). In that case, the Court of Appeals held the word "shall" in § 925 requires a carrier to provide notice to the fund within the statutory limitation or forfeit its right to reimbursement from the vocationally handicapped provision.

In the dual employment area, carriers usually submit requests for reimbursement well within one year of the date of first payment. There are instances, however, when carriers submit applications for reimbursement months, and even years, after the first date of payment. When applications are received late without documentation, it is often difficult to secure the appropriate wage, employment and medical records from both the injured worker and employers that support reimbursement of the claim.

The committee discussed the issue and agreed carriers have a responsibility to make timely requests for reimbursement. It is not unreasonable for a carrier to submit a claim for reimbursement within one year after the date payments are initiated. Carriers should receive reimbursement for compensation properly paid that is the responsibility of the fund, as long as the compensation was paid within one year of the date the reimbursement application is filed. It was also agreed that, if an application for hearing is pending in the court system, the one year time limit should start when the award becomes final.

The committee concluded the statute should be amended to limit fund reimbursements to those payments actually made within one year prior to the date the application for reimbursement is filed. By statutorily limiting reimbursement to one year, carriers would be encouraged to submit claims timely, thus reducing the number of stale and difficult-to-document claims. The amendment would apply not only to the dual employment provision of the Second Injury Fund but also to all provisions of the three funds in Chapter Five. Additionally, the committee suggested adding language to the statute that would codify the one year filing limitation in medical benefit reimbursement claims under § 862 (2).

Second Injury Fund, Dual Employment Provision

Recommendation:

The committee recommends the statute be amended to limit a carrier's right to reimbursement for benefits properly paid within one year before the application for reimbursement is submitted to the Second Injury Fund; Silicosis, Dust Disease and Logging Industry Compensation Fund; and the Self-Insurers' Security Fund. The committee further recommends amending § 862 to require the filing of reimbursement applications within one year after the final determination is entered in Second Injury Fund, 70% reimbursement and medical benefit reimbursement cases.

The proposed statutory change to § 541 (2), states:

> "Once the carrier makes payments that are the liability or become the liability of the funds, the funds shall reimburse the carrier for all properly made payments within one year prior to the date the carrier files a claim for reimbursement."

To accommodate the requirements for reimbursement of 70% benefit payments by the Second Injury Fund under § 862 (1), and the medical benefit reimbursement claims in § 862 (2), the following statutory language is proposed:

> "An application for reimbursement of benefits paid pursuant to this section shall be submitted no later than one year after a final determination is entered."

Committee's Conclusion

Conclusion:

The Workers' Compensation Funds Advisory Committee was created to review, analyze and make recommendations for change in areas of the Second Injury Fund that are considered complex, litigious and controversial. The problem areas and issues were identified by the Funds Review Committee in its report issued March 6, 2000 and by the Funds Administration staff.

In the permanent and total disability provision of the Second Injury Fund, the Advisory Committee reviewed the current method of calculating permanent and total disability benefit rates as well as other possible methods that would simplify the calculation. The Advisory Committee concludes that, while the method of calculating the differential benefit rate could be simplified, the current method is preferred. The method of calculating differential benefit rates should remain unchanged and be placed on the Bureau of Workers' Disability Compensation's web site.

In the dual employment provision of the Second Injury Fund, the Advisory Committee reviewed the methods of calculating reimbursement in specific loss, death and maximum benefit cases. The committee also reviewed the 80%/20% apportionment test that is applied to determine whether the fund has reimbursement liability. In addition, the committee reviewed the statutory requirement that states only wages which were reported to the Internal Revenue Service should be used when determining the apportionment percentages.

It is the committee's conclusion a carrier should pay no more, and no less, in weekly benefits when an injured employee had multiple jobs on the date of injury than the carrier would have paid if the employee held one job. Further, the committee concludes there is no reason to deny reimbursement to carriers when the injured employee earned more than 80% of the average weekly wage at the place of injury. In addition, the committee felt the IRS reporting requirement found in § 372 (3) is inconsistent with § 371 which indicates an employee is compensated for all wage loss covered under the statute.

Committee's Conclusion

The committee recommends significantly modifying the method of calculating the liabilities of the carrier and the fund in dual employment cases, as follows:

- Eliminate the 80%/20% apportionment test.
- Eliminate the IRS reporting requirement.
- The fund should reimburse the difference between the total weekly benefit rate and the amount the carrier pays based on wages earned at the place of injury.
- The carrier should pay no less than the statutory minimum rate when the injured worker suffered a specific loss or death.
- The carrier should pay the maximum weekly rate, without reimbursement from the fund, when the place-of-injury average weekly earnings support the maximum weekly rate.
- The carrier should receive credit for post-injury earnings at the place of injury or at a job other than the non-injury employer(s) at the time of injury; the dual employment provision would take credit for any excess earnings after the carrier's liability is reduced to zero. The dual employment provision should take credit for post-injury earnings at the non-injury job(s) at the time of injury; the carrier would take credit for any excess earnings after the dual employment provision's liability is reduced to zero.

In the area of coordination, the Advisory Committee recommends amending the statute to permit the coordination of benefits received from the non-injury employer by the dual employment provision only. The amount coordinated by the dual employment provision should be applied as a wage continuation amount under § 361. For the purpose of coordinating the non-injury employer's benefits, the full value of discontinued fringe benefits from the non-injury employer shall be included in calculating the injured employee's average weekly wage. All benefits financed by the place of injury, as well as social security benefits under § 354 and unemployment compensation benefits under § 358, would be coordinated by the carrier against its portion of the weekly benefit rate. If the carrier's share of the benefit rate is coordinated to zero, the fund could coordinate any unused benefits financed by the place of injury, including social security and unemployment compensation benefits. The Second Injury Fund's share of the dual employment benefit can be withheld until the carrier requests, and the employee provides, a description of the benefit received from the non-injury employer. The committee acknowledges the concepts involved in amending the statute regarding coordination of the non-injury employer's benefits is both complex and controversial.

Committee's Conclusion

The committee also recommends amending the statute to compensate all employees covered by § 161 (1)(d) through (j) based on the state average weekly wage when the employee's actual average weekly earnings are less than 20% of the state average weekly wage.

The committee concludes that to allow apportionment of liability between carriers when more than one employer caused or contributed to the disability in dual employment cases contradicts current statutory intent. The committee recommends the dual employment provision reimburse the liable carrier for wage loss benefits paid in excess of the employer's liability.

In addition, the committee recommends the Second Injury Fund request a Rule V hearing for non-compliance with the workers' compensation statute when a carrier continually requests pre-determinations from the fund before paying dual employment benefits to the disabled worker.

Finally, the committee recommends enacting a one-year back reimbursement limit to encourage timely submissions of reimbursement applications to all provisions of the five funds in Chapter Five. Also, the committee recommends amending § 862 to require the filing of reimbursement applications within one year after the final determination is entered in Second Injury Fund, 70% reimbursement provision and medical benefit reimbursement cases.